No. 83-572

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLOYD C. BALDWIN, *et al.*,
Petitioners,

v.

CITY OF WINSTON-SALEM, N.C., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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October 13, 1983

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QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the Fourteenth Amendment prohibit arbitrary actions by municipalities in annexing territory?

2. Does the due process clause continue to require judicial review by state courts of constitutional challenges to state action?

PARTIES

Four cases were consolidated for review in the Court of Appeals. Petitioners -- appellants and cross-appellees in the Court below -- are

Floyd C. Baldwin, Ruby S. Baldwin, William Edward Kirby, Jr., Brenda Head Kirby, Richard B. Charles, Frances S. Charles, Raymond E. Wigley and Dorothy Wigley;

W.E. Derrick, Carl L. Gaile, R.R. Lee and D.M. Randall;

Henry Brewer, Robert M. Burcham, Philip Demarko, Joy M. McNab, Gladys Norman, Sam Pope, James A. Sneed and Cornelius F. Spach;

Raintree Homeowners Association, Inc., Louis Capots, John Geis, Charles Herbert Green, Robert D. Kinniburgh, Jr. and Kenneth Smelter.

Respondents -- appellees and cross-appellants in the Court below -- are

City of Winston-Salem, N.C., Mayor Wayne A. Corpening, Vivian H. Burke, Marilyn S. Harpe, Larry D. Little, Virginia K. Newell, Robert S. Northington, Jr., Ernestine Wilson, Larry W. Womble and Martha S. Wood, City of Charlotte, Eddie Knox, Mayor, David L. Berryhill, Charlie Dannelly, Laura Frech, Harvy B. Gantt, Ron Leeper, Ralph McMillan, Pamela G. Patterson, Edwin Peacock, Jr., George K. Selden, Jr., Herbert Spaugh, Jr. and Minnette C. Trosch.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No.

FLOYD C. BALDWIN, et al.,

Petitioners,

v.

CITY OF WINSTON-SALEM, N.C., et al.,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Petitioners Floyd C. Baldwin, et al., respectfully petition this Court, pursuant to 28 U.S.C. § 1254(1) and Rule 19 of tne Rules of this Court, for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, in the case of Baldwin v. City of

Winston-Salem, N.C., 710 F.2d 132 (1983).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 710 F.2d 132 and is set forth as Appendix A. The opinion of the District Court in Baldwin v. City of Winston Salem is reported at 544 F. Supp. 123 (W.D.N.C. 1982) and is attached as Appendix B. The opinion of the District Court in Raintree Homeowners Association v. City of Charlotte and Carlisle v. City of Charlotte is reported at 543 F. Supp. 625 (W.D.N.C. 1982) and is attached as Appendix C. The opinion of the District Court in Brewer v. City of Winston-Salem is unreported and is attached as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered June 15, 1983. On petitioners' timely motion filed August 23, 1983, this Court extended the time within which to file a petition for writ of certiorari to October 13, 1983. This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following provisions are pertinent to this case: section 1 of the Fourteenth Amendment to the U.S. Constitution, set forth in Appendix E; N.C. Gen. Stat. § 160A-50, set forth in Appendix F.

STATEMENT OF THE CASE

This case, a consolidation of four cases challenging annexations by Winston-Salem and Charlotte, North Carolina, concerns the limits that the due process clause of the Fourteenth Amendment places on municipal annexations.

Under North Carolina law, municipalities are authorized to extend their municipal corporate limits by annexation of contiguous areas. N.C. Gen. Stat. § 160A-48. State law defines the permissible nature of such annexations, and establishes administrative procedures to be employed by the municipalities. Judicial review of annexations is "limited," as the Fourth Circuit conceded. App. A, 9a.

Appellate review is statutorily restricted to a determination of whether statutory procedures relating to notice and hearing have been met; whether the annexing city has properly prepared a report that includes maps of the territory to be annexed and plans for the provision of municipal services; and whether the territory to be annexed is urban in nature under the very flexible criteria established by the statute. N.C. Gen. Stat. § 160A-50, App. F, 1f; see N.C. Gen. Stat. §§ 160A-47, 160A-48. The reviewing court may not separately and independently determine whether municipal conduct in annexing territory is arbitrary, capricious, or unreasonable, or in any other respect unconstitutional.

The North Carolina Supreme Court has held that judicial review "is limited by statute." In re Annexation Ordinance, 303 N.C. 220, 229, 278 S.E.2d 224, 230 (1981). The reviewing court may "determine only whether the municipal governing board substantially complied with the requirements of the applicable annexation statutes." 303 N.C. at 229, 278 S.E.2d at 230 (emphasis added). Thus, no "separate test of 'reasonableness' [is found] within the limited scope of judicial review permitted in annexation cases." 303 N.C. at 230, 278 S.E.2d at 231. Accord, Food Town Stores v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980).

This case began with four separate lawsuits: Baldwin, et al., v. City of Winston-Salem, et al., and Brewer, et

al. v. City of Winston-Salem et al., which challenged several different annexations in Winston-Salem, N.C.; Raintree Homeowner's Association, et al. v. City of Charlotte, et al., and Carlisle, et al., v. City of Charlotte, et al., which challenged two different annexations in Charlotte, N.C.[1/] The facts relevant to this petition may be summarized briefly.

Each case involved a two-prong challenge under the Fourteenth Amendment. First, petitioners alleged in their complaints that the annexations at issue were arbitrary, capricious, and unreasonable in violation of federal due process. Second, petitioners alleged

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1/ The annexations challenged in the Brewer and Raintree cases are not yet consummated.

that the North Carolina annexation statute on its face and as applied violates due process by prohibiting judicial review of significant constitutional questions, including whether an annexation is arbitrary, capricious, and unreasonable.

Petitioners pleaded with particularity the arbitrary nature of the four annexations. Specifically, they claimed that the boundaries of the areas to be annexed were gerrymandered to include well-to-do neighborhoods and to exclude poor areas, in one instance creating a virtual hole in a city; or to include farmland or a business entity that would provide tax revenue without requiring municipal services; or to exclude areas that needed municipal services; or to include neighborhoods that already had

services superior to those offered by the cities simply to gain additional tax revenues. Petitioners also claimed that the proposed annexation boundaries arbitrarily divided established communities; or that the annexations excluded neighborhoods close to the annexing cities while arbitrarily including more distant neighborhoods; or, in one instance, that an annexation took in property that, if it belonged in any municipality, belonged in another one. In sum, petitioners claimed that the annexations in major part made no geographic or historic sense, would yield inferior municipal services to the annexed territories, and were designed simply to obtain increased municipal revenues at the least possible cost. These allegations demonstrated the arbitrary, and

hence unconstitutional, nature of the annexations.

In each case, the district court dismissed the complaint. Relying on Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), the courts held that "challenges to annexations generally are not actionable under the Fourteenth Amendment." App. B, 4b; see App. C, 20c-21c; App. D, 3d. In no case did the district court decide whether the annexations actually were arbitrary and unreasonable.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed in a per curiam decision. The Court began by observing that the "creation and redrawing of the political subdivisions of a state . . . are peculiarly matters involving state political

concerns." App. A, 11a (footnote omitted). Indeed, the Court of Appeals continued, the "Supreme Court early in this century flatly stated that 'annexation by a city or town is purely a state political matter, entirely within the power of the state legislature to regulate.'" App. A, 11a, quoting Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907). Although the Fourth Circuit recognized that annexations that discriminate against black citizens, Gomillion v. Lightfoot, 364 U.S. 339 (1964), diminish the right to vote, Hayward v. Clay, 573 F.2d 187, 190 (4th Cir. 1978), or in some other way burden "fundamental" interests may implicate the Fourteenth or Fifteenth Amendments, it ruled that annexations generally are outside the purview of

federal constitutional interest. App. A, 12a-15a. Specifically, the Court ruled that "there is no right under the Fourteenth Amendment to challenge annexation decisions alleged merely to be arbitrary and capricious." App. A, 16a, n.3.

Because the Fourth Circuit held that annexations do not implicate due process concerns, it also concluded that "there is no federal right to have state courts hear challenges to allegedly arbitrary and capricious annexation decisions; the availability of such review is solely a matter of state law." App. A 16a, n.3.

REASONS FOR GRANTING THE WRIT

Introduction

The lower courts that considered petitioners' Fourteenth Amendment claims felt bound to follow the broad dictum contained in Hunter v. City of Pittsburgh, 207 U.S. 161 (1907): that the municipal annexation process raises no Fourteenth Amendment concerns. Although the decision in Hunter was narrow, its broader implications have been followed from time to time by various federal courts. See, e.g., Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978). Recently in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978), this Court, while recognizing that the broad assertions in Hunter have been "qualified" by later cases, stated that Hunter "continues to have

substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." Thus, because of Hunter, petitioners' well-pleaded claims of arbitrariness have never been heard on their merits.

This Court should firmly hold that the due process clause of the Fourteenth Amendment applies to the annexation process and prohibits arbitrary state conduct. When Hunter was decided in 1907, the Fourteenth Amendment was fewer than forty years old. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), which roundly rejected the applicability of the Bill of Rights to the states through the Fourteenth Amendment, dominated constitutional

jurisprudence. Indeed, only one provision of the Bill of Rights had been "incorporated" under the Fourteenth Amendment when Hunter disclaimed any federal interest in municipal annexations. The modern expansive reading of the due process clause had not yet taken hold.

Part A begins by briefly setting forth the development of Fourteenth Amendment law. That historical review will demonstrate that the legal principles informing Hunter have long since been overruled and that, as a consequence, Hunter itself has lost much of its precedential force. Part A will conclude by showing that petitioners' allegations of arbitrary state conduct constitute a federal cause of action under well-established Fourteenth Amendment case law.

Part B shows that North Carolina's failure to provide judicial review for constitutional challenges to municipal conduct violates almost half-a-century of settled Fourteenth Amendment law.

A. Arbitrary State Conduct Violates The Fourteenth Amendment

The Court of Appeals held that petitioners' allegations of arbitrary state conduct failed to state a cause of action because annexations are "peculiarly matters involving state political concerns," App. A, 11a, and generally immune from Fourteenth Amendment scrutiny. The express basis for the Court's decision was Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). Although Hunter actually adjudicated a very narrow question -- whether citizens of one municipality may by their vote alone defeat annexation by another

municipality -- its broadly phrased ratio decidendi tended to suggest that all decisions relating to municipal boundaries are beyond the reach of the Fourteenth Amendment. Thus, the Hunter Court held that a state may, among other things, alter the boundaries of a municipality "conditionally or unconditionally, with or without the consent of the citizens, or even against their protest." 207 U.S. at 179.

Hunter's narrow reading of the Fourteenth Amendment followed the established precedents of its day, for when Hunter was decided in 1907 the due process clause placed few restrictions on state conduct of any sort. Indeed, the gradual process of "incorporating" the Bill of Rights was not to begin for another twenty years. Prior to passage

of the Fourteenth Amendment, it was settled law that the Bill of Rights did not restrain state action. In 1833, Chief Justice Marshall held that "[t]hese Amendments contain no expression indicating an intention to apply them to the State governments," Barron v. The Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), a view that the Court reaffirmed on other occasions. See, e.g., Withers v. Buckley, 61 U.S. (20 How.) 84 (1857); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847).

Ratification of the Fourteenth Amendment did not immediately upset this settled doctrine. In the Supreme Court's first interpretation of the Civil War Amendments in the

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), Justice Miller rejected the argument that the Fourteenth Amendment was intended to "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people...." 83 U.S. (16 Wall.) at 78. Noting that the "one pervading purpose" underlying the Civil War Amendments was the "freedom of the slave race," 83 U.S. (16 Wall.) at 71, the Court rejected the idea that the Fourteenth Amendment had a content beyond the problems that gave rise to it. See generally C. Fairman, Reconstruction and Reunion, 1864-88 (Part One) (6 History of the Supreme Court of the United States) at 1260-1300; G. Gunther, Constitutional Law (1975 ed.) at 486-505.

Over the next twenty years, the Supreme Court consistently rebuffed attempts to read the Fourteenth Amendment more expansively. In a variety of contexts,2/ the Court held that neither the privileges and immunities clause nor the due process clause was a limitation against state encroachment on personal freedoms. See, e.g., Pressler v. Illinois, 116 U.S. 252 (1886) (right

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2/ Five years after the Slaughter-House Cases were decided, Justice Miller expressed his surprise that counsel continued to advocate positions seemingly foreclosed by that case. "[T]he docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment." Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

to keep and bear arms neither a privilege and immunity nor a liberty); United States v. Cruikshank, 92 U.S. 542 (1875) (right to peaceable assembly not a privilege and immunity); O'Neil v. Vermont, 144 U.S. 323 (1892) (right to be free from cruel and unusual punishment not a privilege and immunity); Brown v. New Jersey, 175 U.S. 172 (1899) (right to jury trial not a part of due process); Twining v. New Jersey, 211 U.S. 78 (1908) (right against self-incrimination not within due process clause). But see Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) (recognizing Fourteenth Amendment right to compensation for property taken by state). See generally Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366

(1911); Warren, The New "Liberty" Under The Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926).

The initial shift in due process analysis came with this Court's decision in Allgeyer v. Louisiana, 165 U.S. 578 (1897). In the first of the so-called substantive due process decisions, the Court held that a Louisiana statute concerning property insurance violated liberty of contract under the Fourteenth Amendment. The Court invoked substantive due process analysis over the next 35 years to invalidate a host of state statutes. See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (state labor law limiting the length of the work week held a violation of the Fourteenth Amendment); Coppage v. Kansas, 236 U.S. 1 (1915) (law protecting labor

organizing efforts held unconstitutional).

Despite a willingness during the Lochner era to protect economic interests as a "liberty" under the Fourteenth Amendment, the Supreme Court continued to reject claims that the fundamental personal rights guaranteed against federal encroachment by the Bill of Rights were also guaranteed against state encroachment by the Fourteenth Amendment. Not until 1925, when the Court first held that free speech was a liberty under the Fourteenth Amendment, did the gradual process of "incorporation" and expansion of Fourteenth Amendment protections begin. Gitlow v. New York, 268 U.S. 652 (1925); accord, Fiske v. Kansas, 274 U.S. 380 (1927).

The historical inevitability of the Hunter decision is apparent from this brief review of the development of due process analysis. In 1907, when Hunter was decided, the Slaughter-House Cases continued to bar challenges to state laws abridging personal freedoms3/ -- at least those outside the economic realm. The process of incorporating into the Fourteenth Amendment the specific guarantees of the Bill of Rights was still eighteen years away. It is equally apparent, however, that Hunter -- or at least its broader dictum -- should have little continuing precedential force.

3/ Justice Moody, author of Hunter, also wrote the opinion for the Court in Twining v. New Jersey, 211 U.S. 78 (1908), which held that the privilege against self-incrimination is not guaranteed by the Fourteenth Amendment.

First, the intellectual antecedents of Hunter -- the Slaughter-House Cases and their progeny -- are clearly no longer law. Since 1925, the Supreme Court has held binding upon the states through the Fourteenth Amendment virtually all the provisions of the Bill of Rights. See Gitlow v. New York, 268 U.S. 652 (1925) (free speech, press, religion); Mapp v. Ohio, 367 U.S. 643 (1961) (freedom from unlawful searches); Malloy v. Hogan, 378 U.S. 1 (1964) (freedom from compelled self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); In re Oliver, 333 U.S. 257 (1948) (right to public trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to

confront opposing witnesses); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process). See generally Duncan v. Louisiana, 391 U.S. 145 (1968).

Even outside the specific protections afforded by the Bill of Rights, the due process clause now provides substantial constraints against state conduct that are inconsistent with the dictum in or the reasoning underlying Hunter. For example, the Fourteenth Amendment now requires the equal apportionment of votes among the citizens of a state, Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964), and prohibits, absent a compelling state interest, burdens on the right to vote. Kramer v. Union Free School District, 395 U.S. 621 (1969).

It limits summary prejudgment remedies in civil litigation. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). The Fourteenth Amendment requires a hearing for the denial of welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970), and, in some situations, for the failure to renew a contract of employment with the state. Perry v. Sindermann, 408 U.S. 593 (1972).

Second, the key principle of Hunter -- that the state "at its pleasure" may "expand or contract the territorial area" of a municipality, 207 U.S. at 178 -- is simply no longer true. For example, gerrymandering the boundaries of a city to disenfranchise black voters violates the Fifteenth Amendment. Gomillion v. Lightfoot, 364 U.S. 339 (1960); see Reynolds v. Sims, 377 U.S.

at 566 (discrimination in voting violates Fourteenth Amendment). But more generally, the notion that a municipality may take action against persons or property "at its pleasure" is abhorrent to the idea of due process.

No principle is more basic to constitutional government than the prohibition against arbitrary conduct by a state. At least as early as Hurtado v. California, 110 U.S. 516 (1884), this Court identified the fundamental inconsistency between arbitrariness and due process of law. "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude." 110 U.S. at 536. In Slochower v. Board of Higher

Education of New York, the Court reaffirmed the importance of the "'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process." 350 U.S. 551, 559 (1956) (quoting Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302 (1937)). Accord, Ingraham v. Wright, 430 U.S. 651, 672-73 (1977); Wolff v. McDonnell, 418 U.S. 539, 558 (1974). Certainly an annexation decided by lot or bribery, although at the state's "pleasure," would not comport with the due process clause.

Petitioners do not seek a ruling from this Court federalizing state annexation procedures. In some states, unlike North Carolina, see part B, infra, courts will entertain challenges

on constitutional grounds to the reasonableness of annexations. See, e.g., State ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947); Pyle v. City of Shreveport, 215 La. 257, 40 So. 2d 235 (1949); cf. 5 U.S.C. § 706(2)(A) (authorizing federal courts to strike down "arbitrary [and] capricious" agency action). A decision by this Court that due process prohibits arbitrary annexations will likely result in review by North Carolina courts of this constitutional issue. See Part B, infra.

Petitioners also do not seek a ruling that the conduct alleged in this case is unconstitutional. Whether the conduct alleged here is in fact arbitrary should later be decided by the district courts.4/ Petitioners seek

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4/ Conduct similar to that challenged in this case has been held arbi-

[Footnote continued]

only a narrow ruling that arbitrary and capricious conduct violates due process; that, contrary to Hunter, due process prohibits arbitrary action taken at the state's "pleasure."

The Court has already recognized that some of the "broad statements as to state control over municipal corporations contained in Hunter have undoubtedly been qualified by the holdings of later cases. . . ." Holt Civic Club v. City of Tuscaloosa, 439 U.S. at 71 (citing Kramer v. Union Free School District, 395 U.S. 621 (1969)). The broader dictum of Hunter has thus become, in the words of Mr. Justice

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[Continued from previous page]

trary and unconstitutional by other courts. See, e.g., State ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947).

Frankfurter, a "derelict on the waters of the law." Lambert v. California, 355 U.S. 225, 232 (dissenting opinion). This Court should now hold that due process principles regulate the process of municipal annexations and prevent arbitrary and capricious conduct.5/

B. The Due Process Clause Requires State Judicial Review of Constitutional Challenges to State Action

Under North Carolina law, judicial review of annexations is severely

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5/ Federal courts in circuits other than the Fourth have ruled that the Fourteenth Amendment prohibits arbitrary and capricious annexations. See, e.g., Doyle v. Municipal Commission of Minnesota, 340 F. Supp. 841, 844 (D. Minn.), aff'd, 468 F.2d 620 (8th Cir. 1972); Adams v. City of Colorado Springs, 308 F. Supp. 1397, 1405 (D. Colo.), aff'd 399 U.S. 901 (1970). There is thus a division in the circuits that ought to be resolved.

limited. See N.C. Gen. Stat. § 160A-50; App. F, 1f. In an interpretation of state law that is binding on the federal courts, O'Brien v. Skinner, 414 U.S. 524, 531 (1974); Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), the North Carolina Supreme Court has held that no "separate test of 'reasonableness' [is found] within the limited scope of judicial review permitted in annexation cases." In re Annexation Ordinance, 303 N.C. 220, 230, 278 S.E.2d 224, 231 (1981) (evidence showing arbitrary conduct not considered). Accord, Food Town Stores v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980).

Because the Fourth Circuit in this case held that arbitrary and capricious annexations do not violate federal due

process, it also held that there is no federal constitutional right to have state courts hear challenges to arbitrary and capricious annexation decisions. App. A, 16a, n.3. This Court, however, should hold that the judicial review provision of the North Carolina annexation statute is unconstitutional both on its face and as applied in this case.

Part A outlined the changing imperatives of due process since ratification of the Fourteenth Amendment in 1868. One principle, however, has remained unchanged for almost a century: that due process requires judicial review of constitutional challenges to state conduct. In Chicago, M. & St. P. R. Co. v. Minnesota, 134 U.S. 418 (1890), a railroad challenged rates set

by a state commission, contending that they were unreasonably low and unequal. The state supreme court refused review on the ground that under state law the rates set by the commission were intended to be "final and conclusive." 134 U.S. at 456. On appeal, the Supreme Court reversed, holding that due process of law requires a judicial hearing on the railroad's constitutional challenge. "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." 134 U.S. at 458 (emphasis added). Accord, Wadley S.R. Co. v. Georgia, 235

U.S. 651, 660-61 (1915) (party affected by regulatory orders is "entitled, by the due process clause, to a judicial review . . . as to whether he has been thereby deprived of a right protected by the Constitution"); Missouri v. Chicago, B. & Q.R. Co., 241 U.S. 533, 537-38 (1915) (right to judicial review is "well-settled" principle).

This due process doctrine was reaffirmed in the leading case of Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). There a state utility commission, finding that a water company's rates were unreasonably high, reduced them. The Pennsylvania Supreme Court affirmed because the state statute made the commission's determinations conclusive. On appeal, the Supreme Court reversed on the ground that denial

of the opportunity for review of constitutional questions is itself a denial of due process of law. "[I]f the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." 253 U.S. at 289. Reversal was required because "[t]hus far [the water company] has not succeeded in obtaining the review . . . which the Fourteenth Amendment requires the State to provide." Id.

In St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 49-54 (1936), which involved a Department of

Agriculture rate order, the Supreme Court recognized a similar Fifth Amendment due process right to judicial review of constitutional questions arising in federal administrative proceedings. In a well-known concurring passage, Justice Brandeis observed, "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." 298 U.S. at 84.6/ See 5

6/ The view expressed in Ben Avon and St. Joseph Stock Yards that, on appeals from administrative deci-

[Footnote continued]

U.S.C. § 706(2)(A) (authorizing federal courts to reverse "arbitrary [and] capricious" agency conduct).

The continuing vitality of this principle is shown by various decisions that have construed federal administrative statutes to allow judicial review in order to avoid the constitutional question that failure to provide review would raise.7/ For example, in Johnson

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[Continued from previous page]

sions, courts should review facts de novo has been criticized. See, e.g., Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, 980-84 (1957). But cf. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.34 (1982). However, the requirement that constitutional questions arising from state or federal administrative proceedings must be subjected to judicial review remains sound law.

7/ See Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an

[Footnote continued]

v. Robison, 415 U.S. 361 (1974), where the constitutionality of a veterans benefit statute was challenged, the Government contended that judicial review was barred by a provision purporting to render all administrative decisions final and unreviewable. Noting that a construction foreclosing constitutional challenges to the act would "raise serious questions concerning the constitutionality" of that statute, the Court read the statute to permit judicial review of such claims. 415 U.S. at 366. Accord, Califano v.

[Continued from previous page]

> act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

Sanders, 430 U.S. 99, 109 (1977); Weinberger v. Salfi, 422 U.S. 749, 762 (1975).

Unlike the federal courts that have been able to construe federal statutes as permitting judicial review, this Court is unable through statutory construction to avoid the constitutional question. This Court should thus follow the path of Ben Avon and hold that, by denying judicial review of constitutional challenges to state conduct, the North Carolina annexation statute is unconstitutional.

CONCLUSION

For the reasons stated, this Court should grant the writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1761

Floyd C. Baldwin; Ruby S. Baldwin; William Edward Kirby, Jr.; Brenda Head Kirby; Richard B. Charles; Frances S. Charles; Raymond E. Wigley and Dorothy Wigley,

Appellants,

v.

City of Winston-Salem, NC; Mayor Wayne A. Corpening; Vivian H. Burke; Marilyn S. Harpe; Larry D. Little; Virginia K. Newell; Robert S. Northington, Jr.; Ernestine Wilson; Larry W. Womble and Martha S. Wood,

Appellees.

No. 82-1767

Raintree
Homeowners Association,
Inc.; Louis Capots; John Geis;
Charles Herbert Green; Robert D.
Kinniburgh, Jr. and Kenneth Smelter,

Appellants,

v.

City of Charlotte; Eddie Knox,
Mayor; L. David Berryhill;
Charlie Dannelly; Laura Frech;
Harvy B. Gantt; Ron Leeher;
Ralph McMillan; Pamela G.
Patterson; Edwin Peacock, Jr.;
George K. Selden, Jr.; Herbert
Spaugh, Jr. and Minnette Trosch,

Appellees.

No. 82-1768

H.B. Carlisle; W. E. Derrick;
Carl L. Gaile; R. R. Lee and
D. M. Randall,

Appellants,

v.

City of Charlotte; Eddie Knox, Mayor; David L. Berryhill; Charlie Dannelly; Laura Frech; Harvy B. Gantt; Ron Leeper; Ralph McMillan; Pamela G. Patterson; Edwin Peacock, Jr.; George K. Selden, Jr.; Herbert Spaugh, Jr. and Minnette C. Trosch,

Appellees.

No. 82-1785

Raintree Homeowners Association, Inc.; Louis Capots; John Geis; Charles Herbert Green; Robert D. Kinniburgh, Jr. and Kenneth Smelter,

Appellees,

v.

City of Charlotte; Mayor Eddie Knox; David L. Berryhill; Charlie Dannelly; Laura Frech; Harvy B. Gantt; Ron Leeher; Ralph McMillan; Pamela G. Patterson; Edwin Peacock, Jr.; George K. Selden, Jr.; Herbert Spaugh, Jr. and Minnette Trosch,

Appellants.

No. 82-1786

H. B. Carlisle; W. E. Derrick; Carl L. Gaile; R. R. Lee and D. M. Randall,

Appellees,

v.

City of Charlotte; Mayor Eddie Knox; David L. Berryhill; Charlie Dannelly; Laura Frech; Harvy B. Gantt; Ron Leeper; Ralph McMillan; Pamela G. Patterson; Edwin Peacock, Jr.; George K. Selden, Jr.; Herbert Spaugh, Jr. and Minnette C. Trosch,

Appellants.

No. 82-2120

Henry Brewer; Robert M. Burcham; Philip Demarko; Joy M. McNab; Gladys Norman; Sam Pope; James A. Sneed and Cornelius F. Spach,

Appellants,

v.

City of Winston-Salem; Mayor Wayne A. Corpening; Vivian H. Burke; Marilyn S. Harpe; Larry D. Little; Virginia K. Newell; Robert S. Northington, Jr.; Ernestine Wilson; Larry W. Womble and Martha S. Wood,

Appellees.

82-1761 - Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, Chief Judge; 82-1767 - Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge; 82-1768 - Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge; 82-1785 - Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge; 82-1786 - Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge; 82-2120 - Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge.

Submitted April 4, 1983

Decided June 15, 1983

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and KELLAM,[1] Senior

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1/ Honorable Richard B. Kellam, Senior United States District Judge for

(Footnote cont'd on next page)

District Judge.

(James Hamilton, Robert L. Deitz, Susan A. Cobb, Ginsburg, Feldman, Weil and Bress, Chartered; Rosbon D.B. Whedbee; F. Lee Weaver, Weaver & Bennett, P.A.; Hugh G. Casey, Jr., Casey & Bishop, P.A. on brief) for Appellants; (Roddey M. Ligon, Jr., Womble, Caryl, Sandridge & Rice; Ronald G. Seeber, Ralph D. Karpinos; Henry W. Underhill, Jr., H. Michael Boyd on brief) for Appellees.

(Footnote cont'd)

the Eastern District of Virginia, sitting by designation.

PER CURIAM:

These consolidated cases present the single question of whether landowners who allege that their real property is to be annexed by a municipality in order to increase the municipality's tax base have stated a claim upon which relief can be granted under the due process clause of the Fourteenth Amendment. The district courts uniformly held that they have not. We affirm.

I.

Under North Carolina law, municipalities are authorized to extend their municipal corporate limits by annexation of contiguous real property. N.C. Gen. Stat. § 160A-48. State law defines the permissible purposes for,

and scope of, such annexation, establishes administrative procedures to be employed by the municipalities, and provides for limited state judicial review of annexation decisions. Id. §§ 160A-48 to -54. The six cases before us arose from four annexation ordinances adopted by the cities of Winston-Salem and Charlotte. Each ordinance provided for the annexation into the municipality of certain real property located outside the city limits.

In each case, the landowner filed suit in the district court seeking to have the city ordinance, and the underlying annexation, declared unconstitutional under the due process clause of the Fourteenth Amendment. The plaintiffs alleged in their complaints that the reason for each annexation was a

desire to increase the city's tax revenues and its allocation of state revenue-sharing funds, that the services to be provided by the city in the annexed area would be inferior to services already available, and that the city officials acted arbitrarily in choosing to annex more prosperous areas while not incorporating poorer ones. Plaintiffs also alleged that the judicial review provisions under state law, id. § 160A--50, unconstitutionally bar judicial review of whether annexation decisions are arbitrary and capricious.

The district courts concluded that plaintiffs were not entitled to relief based on these allegations, and dismissed the cases. Plaintiffs now appeal; the City of Charlotte cross-appeals the denial of its request for attorneys' fees.

II.

It has long been held that the creation and redrawing of the political subdivisions of a state, unlike the exercise of power by those subdivisions,2/ are peculiarly matters involving state political concerns. Indeed, the Supreme Court early in this century flatly stated that "annexation by a city or town is purely a state political matter, entirely within the power of the state legislature to regulate." Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907). The Court there recognized that municipal

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2/ Municipalities and other state subdivisions may, of course, be sued when in exercising state powers such as the power to condemn land or the police power they violate rights secured by the Constitution or laws of the United States.

annexations often simply represent the internal political reordering of a state.

Subsequent decisions have made clear, however, that municipal annexations are subject to at least some scrutiny under both the Fifteenth and Fourteenth Amendments to the United States Constitution. In Gomillion v. Lightfoot, 364 U.S. 339 (1964), the Supreme Court invalidated an Alabama law redefining the municipal limits of Tuskegee where that redefinition was motivated by a desire to disenfranchise black citizens. And in Hayward v. Clay, 573 F.2d 187, 190 (4 Cir. 1978), we held that if the annexation decision is to be made through a general vote of the city's inhabitants, the inhabitants of the area proposed for annexation must be afforded the right to vote as well.

Nonetheless, we noted in Berry v. Bourne, 588 F.2d 422 (4 Cir. 1978), that exceptions to the general rule that annexations are to be accorded considerable deference have been recognized only in those two situations. Moreover, the principle of according such deference has subsequently been reaffirmed by the Supreme Court:

> In Hunter v. Pittsburgh, the Court discussed at length the relationship between a State and its political subdivisions, remarking: "The number, nature and duration of the powers conferred upon municipal corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." While the broad statements as to state control have undoubtedly been qualified by the holdings of later cases such as Kramer v. Union Free School Dist.,3/ we

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3/ Referring to Kramer v. Union Free School District, 391 U.S. 621

(Footnote cont'd on next page)

> think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them.

Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978). We think it plain, based on these cases, that the exercise by a state of the discretion accorded to it in structuring its internal political subdivisions is subject to judicial review under the Fourteenth Amendment

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(Footnote cont'd)

> (1969), which held that a restriction of the right to vote in school district elections to owners and lessees of taxable real property and to parents and custodians of children enrolled in the public schools violated the equal protection clause of the Fourteenth Amendment.

only where that exercise involves the infringement of fundamental rights or the creation of suspect classifications. See Moorman v. Wood, 504 F. Supp. 467, 471-73 (E.D. Ky. 1980).

III.

When tested against this principle, plaintiffs' allegations, even if true, do not entitle them to relief under the Fourteenth Amendment. The allegation that prosperous areas were selected for annexation while less prosperous areas were ignored does not constitute the creation of a suspect classification. Nor is there any fundamental right to be free of additional state taxation. Gomillion made clear that the due process clause "affords no immunity against mere inequalities in tax burdens, nor does it afford protection

against their increase as an indirect consequence of a State's exercise of its political powers." 364 U.S. at 343; see also Deane Hill Country Club, Inc. v. Knoxville, 379 F.2d 321, 325 (6 Cir. 1967) (Fourteenth Amendment challenges cannot be based on pecuniary repercussions in the form of the ordinary incidence of city taxation).4/ No suspect classification or fundamental

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4/ Given our conclusion that the Fourteenth Amendment is not violated where, as here, the proposed annexation does not impinge on fundamental rights or create suspect classifications, there is no right under the Fourteenth Amendment to challenge annexation decisions alleged merely to be arbitrary and capricious. There is, accordingly, no federal right to have state courts hear such challenges to allegedly arbitrary and capricious annexation decisions; the availability of such review is solely a matter of state law.

right is therefore implicated, and the ordinances thus do not abridge the Fourteenth Amendment to the United States Constitution.

IV.

Although we conclude that plaintiffs have not asserted claims entitling them to relief, we think that the claims were not so frivolous, unreasonable or groundless that the district court abused its discretion in declining to award attorneys' fees to the City of Charlotte.

AFFIRMED.

APPENDIX B

Floyd C. and Ruby S. BALDWIN, William Edward Kirby, Jr. and Brenda Head Kirby, Richard B. and Frances S. Charles, Plaintiffs,

and

Raymond and Dorothy Wigley, Intervenors,

v.

CITY OF WINSTON-SALEM, Mayor Wayne A. Corpening, Vivian H. Burke, Marilyn S. Harpe, Larry D. Little, Virginia K. Newell, Robert S. Northington, Jr., Ernestine Wilson, Larry W. Womble and Martha S. Wood, Defendants.

No. C-81-838-WS.

United States District Court, M. D. North Carolina, Winston-Salem Division.

July 28, 1982.

MEMORANDUM OPINION AND ORDER

HIRAM H. WARD, Chief Judge.

The Complaint (December 16, 1981) alleged a fourteenth amendment attack on the North Carolina annexation statutes, N.C. Gen. Stat. §§ 160A-45 et seq., and the annexation by the City of Winston-Salem of the plaintiffs' property. No one disputes that in annexing the plaintiffs' property the City accurately followed the procedure set forth in the statutes and that the annexation was completed and implemented before the plaintiffs began this lawsuit. The parties have filed cross-motions for summary judgment.

Plaintiffs seek a declaratory judgment that portions of the statutes are unconstitutional. In particular, they claim that N.C. Gen. Stat. § 160A-50

restricts state court review of annexations and prevents annexation challenges based on due process grounds. Motion (February 17, 1982). Defendants seek dismissal of the entire action on numerous grounds, including: failure to state a claim upon which relief can be granted, statute of limitations bar, laches, res judicata and collateral estoppel, and lack of standing. The North Carolina Supreme Court has already upheld this same annexation in a suit brought by different landowners represented by different attorneys. In Re Annexation Ordinance, Etc., 303 N.C. 220, 278 S.E.2d 224 (1981). This Court conducted a hearing on the motions on July 26, 1982.

Both the United States Supreme Court and the Fourth Circuit Court of

Appeals have unequivocally resolved the dispositive legal issue presented in this case. In Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), the court stated:

> Hunter v. Pittsburgh (1907) 207 U.S. 161, 178-179, 28 S.Ct. 40 [46], 52 L.Ed. 151, declared that annexation by a city or town is purely a state political or legislative matter, entirely within the power of the state legislature to regulate. Its language was sufficiently broad, as an unfriendly commentator has observed, "to dispose of every conceivable challenge to annexation." ... Thus, it has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds.

Accord Carlisle v. City of Charlotte, (W.D.N.C. 1982) (C-C-81-553-M, July 13, 1982).

This Court is bound to follow the decision of the Fourth Circuit and cannot distinguish its firm language from the facts of this case.5/ Plaintiffs fail to state a claim upon which relief can be granted under the fourteenth amendment.

IT IS, THEREFORE, ORDERED that plaintiffs' Motion for Partial Summary Judgment be, and the same hereby is, DENIED. IT IS FURTHER ORDERED that defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED.

A judgment dismissing this action will be entered accordingly.

5/ Exceptions to the rule stated in Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), do not arise in this case.

APPENDIX C

RAINTREE
HOMEOWNERS ASSOCIATION, INC.,
et al., Plaintiffs,

v.

CITY OF CHARLOTTE,
et al., Defendants.

Nos. C-C-81-553-M, C-C-82-325-M.

United States District Court,
W. D. North Carolina,
Charlotte Division.

June 2, 1982.

Memorandum of Decision and Order

July 13, 1982.

ORDER

McMILLAN, District Judge.

This matter is before the court on the plaintiffs' motion for a temporary restraining order. The action was filed on May 25, 1982. Notice was given to counsel for all parties on May 26, 1982, that a hearing would be held on this motion at 9:30 a. m. on May 27, 1982.

Counsel for all parties appeared at such date and time.

The defendant City and its defendant Council members caused a resolution to be adopted on April 26, 1982, pursuant to N.C.G.S. § 160A-49(a), stating their intent to consider annexation of an area generally described as the Raintree/Providence Plantation Area. That area is further described in the resolution by a metes and bounds description. That same resolution called for a public hearing to be held on the question of annexing this area at 3:00 p. m. on May 27, 1982. Pursuant to N.C.G.S. § 160A-49(e), the defendant City and defendant Council members may not adopt any ordinance annexing any or all of the area until the seventh day following the public hearing.

In view of the facts presented to the court, and the decisions of Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907); Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) and Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), it is unlikely that the plaintiffs will succeed in their Fourteenth Amendment claims. Further, the plaintiffs have not shown sufficient danger of irreparable injury to justify the relief they now seek.

IT IS THEREFORE ORDERED that the plaintiffs' motion for a temporary restraining order is denied.

MEMORANDUM OF DECISION
AND ORDER

On Motions For Summary Judgment
and Dismissal

The plaintiffs in these actions, filed under 42 U.S.C. § 1983, are residents of areas known as Coulwood (No. C-C-81-553-M), and Raintree/Providence Plantation (No. C-C-82-325-M) ("Raintree"). The City of Charlotte (the "City") has effectively annexed Coulwood and has adopted an ordinance which makes the annexation of the Raintree/Providence Plantation areas effective in 1983. The plaintiffs allege that as a result of these annexations, they have been deprived of constitutional rights guaranteed under the due process clause of the Fourteenth Amendment. Because dispositive legal issues are common to each case, these actions have been considered together.

COULWOOD

The Coulwood area lies to the northwest of the center of Charlotte. Major roads running through Coulwood include Mount Holly, Tom Sadler and Valleydale as well as Bellhaven Boulevard. The area contains over 800 dwelling units and about 2,700 residents, and covers about 1,300 acres. The City's proposal to annex Coulwood describes the area as primarily residential with some commercial uses along Bellhaven Boulevard, Tom Sadler and Mount Holly Roads.

On March 24, 1980, the City Council adopted Annexation Ordinance 301-X annexing Coulwood into the City. The ordinance was challenged by Coulwood residents in Mecklenburg County Superior Court. By statute this stayed the

effective date of the annexation. On September 10, 1980, that court entered an order affirming the annexation. The North Carolina Supreme Court affirmed the annexation on December 1, 1981. The Coulwood annexation became effective on December 21, 1981. This action was then filed on December 30, 1981. The plaintiffs are individual homeowners and residents of Coulwood.

RAINTREE/PROVIDENCE PLANTATION

The Raintree and Providence Plantation areas lie to the southeast of the center of Charlotte. The area to be included within the City, includes, but is not limited to, about 2,280 acres which are used for residential purposes. Much of the remaining acreage is used for commercial, industrial, institutional and governmental purposes.

On April 26, 1982, the City Council adopted a resolution to annex the Raintree and Providence Plantation areas. On May 25, 1982, the plaintiffs, the Raintree Homeowners Association and five individual residents of these areas, filed this action. No previous challenge to the annexation has been initiated in the state courts. At the plaintiffs' request, a hearing on a motion for a temporary restraining order to stop further action by the City was held on May 27, 1982. On June 2, 1982, an order was entered denying that motion.

On June 3, 1982, the City Council adopted Annexation Ordinance No. 1182-X annexing the Raintree and Providence Plantation areas. However, the annexation is not to become effective until May 30, 1983.

MOTIONS BEFORE THE COURT

The City has moved to dismiss the Coulwood action on the grounds that the suit is barred by laches, res judicata and the statute of limitations, and that the plaintiffs lack standing. The City has moved to dismiss the Raintree/Providence Plantation action on grounds of comity and federalism, and assert that the plaintiffs lack standing and that there is no case or controversy before the court.

It is doubtful that these defenses bar either of the actions. However, final resolution of these issues is not necessary to the court's decision. The interests of the parties are best served by a prompt and complete decision on the merits of these cases.

DUE PROCESS CLAIMS

On February 25, 1982, the Coulwood plaintiffs filed a motion for a partial summary judgment on their first cause of action. On June 14, 1982, the Raintree/Providence Plantation plaintiffs filed an identical motion.

The City, on May 26, 1982, filed a motion for dismissal of the entire cause of action for failure to state a claim and for summary judgment in the Coulwood case. On June 11, 1982, the City filed a motion to dismiss the Raintree/Providence Plantation action.

A hearing on these motions was conducted on June 22, 1982.

The plaintiffs state two causes of action in each case:

1. That N.C.G.S. § 160A-50(f), which governs judicial

review by state courts of all annexations within the state, as interpreted by the North Carolina Supreme Court, is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution.

2. That the annexation by the City of Coulwood, or of Raintree/Providence Plantation, is arbitrary, capricious, unreasonable, and an abuse of discretion by the City in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

In support of these claims, the complaint in the Coulwood action alleges, inter alia, that:

> Evidence in the Superior Court action demonstrated that the City acted improperly in drawing the boundaries of the annexed areas by including some tracts and not others.
>
> Evidence showed that the City services were neither requested nor wanted by residents of Coulwood.

These allegations are essentially repeated in the Coulwood plaintiffs' motion for partial summary judgment. They contend that the facts before the Superior Court and the City Council were, inter alia, that:

> The primary result of the annexation for Coulwood residents is higher taxes.
>
> That city services were neither needed nor wanted by Coulwood residents.
>
> That the City excluded a nearby area because it contains housing units of low value.

The Raintree/Providence Plantation plaintiffs allege in their complaint that, if permitted by N.C.G.S. § 160A-50(f), they would challenge the annexation with evidence that:

> If the area belongs in any municipality, it should be Matthews (a nearby town) rather than Charlotte.
>
> The City included Raintree and Providence Plantation but not the less affluent areas of Oakdale-Hunter Acres, which are in greater need of the City's services.
>
> The City has not annexed the very affluent area of Quail Hollow, which plaintiffs claim is closer to the center of town than are Raintree and Providence Plantation.
>
> The City has deleted certain areas to meet certain statutory standards.
>
> The City's primary purpose is to raise tax revenue.

Raintree and Providence Plantation have services which are superior to those offered by the City.

The Raintree/Providence Plantation plaintiffs repeat these allegations as the undisputed material facts in support of their motion for partial summary judgment. Specifically, they state that, if permitted by the judicial review provision, they would introduce evidence in Superior Court to show the "unreasonableness" of the annexation. An affidavit by Larry L. Falcone, a Raintree resident and president of the Raintree Homeowners Association, is also offered in support of the Raintree/Providence Plantation motion for summary judgment. His assertions of fact are identical to those in the complaint and those in support of the motion for partial summary judgment.

The facts alleged by the plaintiffs to be undisputed are only offered in support of their motion for summary judgment on their first cause of action, which challenges the judicial review portion of the annexation laws. The plaintiffs are not asking for summary judgment on their claim that each of the challenged annexations is, in fact, arbitrary, capricious and unreasonable. Rather, they assert that it is undisputed that they would introduce evidence to try to show that the annexations are arbitrary, capricious and unreasonable if permitted to do so under the judicial appeal provision of the statute.

For the reasons discussed below, the court is of the opinion that the plaintiffs' motion in each action should

be denied, and that the City's motions for dismissal for failure to state a claim should be granted in each action.

The Coulwood and the Raintree/Providence Plantation plaintiffs (the "plaintiffs") allege that N.C.G.S. § 160A-50(f) is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution because, as interpreted by the North Carolina Supreme Court, it denies them adequate review of the annexations in state court. The challenged provision states that:

> (f) The court shall fix the date for review of annexation proceedings under this Part, which review date shall preferably be within 30 days following the last day for receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court

> without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either
>
> (1) That the statutory procedure was not followed, or
>
> (2) That the provisions of G.S. 160A-47 were not met, or
>
> (3) That the provisions of G.S. 160A-48 have not been met.

The statutory procedure referred to in (f)(1) is set out in N.C.G.S. § 160A-49. That provision requires notice of a public hearing, and sets out guidelines for the public hearing prior to an annexation. N.C.G.S. § 160A-47 requires the City to prepare maps and plans for the services to be provided to the annexed areas. N.C.G.S. § 160A-48 establishes guidelines for the character

of areas to be annexed. Section 160A-48 requires certain contiguous boundaries between the City and the annexed area, and requires that part or all of the area be developed for urban purposes. Urban purpose is defined, in part, in terms of population and usage of the area to be annexed.

Plaintiffs assert that their Fourteenth Amendment rights are denied because § 160A-50(f) limits the grounds upon which they may challenge an annexation to those specifically enumerated in the statute and bars them from arguing that a annexation is arbitrary, capricious and unreasonable. In In Re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981), the North Carolina Supreme Court rejected the assertion that plaintiffs challenging

Winston-Salem annexation had a right to argue that an annexation was arbitrary and unreasonable independent of the grounds listed in N.C.G.S. § 160A-50(f). The Court held that on review of an annexation, a Superior Court may only hear claims based upon the grounds set out in § 160A-50(f), and expressly stated, "Nor do we find a separate test of 'reasonableness' within the limited scope of judicial review permitted in annexation cases." 278 S.E.2d at 231.

Assuming, arguendo, that the due process clause of the Fourteenth Amendment gives the plaintiffs the right to argue on appeal that the annexations are unreasonable, the plaintiffs nonetheless would not be entitled to the relief they seek under their first cause of action. N.C.G.S. § 160A-50(f) and

the provisions incorporated therein, amount to a requirement that the Superior Court determine whether an annexation is reasonable. The language of the provisions does not speak in terms of arbitrariness, capriciousness or unreasonableness. However, the effect of the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by the City. Upon a challenge to North Carolina's annexation law shortly after its enactment in 1959, the North Carolina Supreme Court in In Re Annexation Ordinances Nos. 866-870, etc., 253 N.C. 802, 117 S.E.2d 795 (1961), upheld the provisions, explaining that:

> It certainly cannot be considered a mere shell or ritual of conformity when the governing body of a municipality, in

> good faith, obtains all the information required by the Act, with respect to the character of the area or areas to be annexed, the density of the resident population therein, the extreme boundaries thereof, and the percentage of such boundaries which are adjacent or contiguous to the municipality's boundaries, which must be at least one-eighth; and further provides or makes provision to extend all the governmental services to the newly annexed area or areas, comparable to the services provided for the residents within the city prior to annexation of the new area or areas.

117 S.E.2d at 802.

Further, the plaintiffs are not entitled to relief because their allegations do not bring them within the protection of the Fourteenth Amendment. In Hunter v. Pittsburgh, 207 U.S. 161, 178-79, 28 S.Ct. 40, 46-47, 52 L.Ed. 151 (1907), the United States Supreme Court

held that challenges to annexations generally are not actionable under the Fourteenth Amendment. Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978) makes it clear that Hunter v. Pittsburgh is still good law. In Berry v. Bourne, the district court's dismissal of the plaintiff's motion for a preliminary injunction to stop an annexation was affirmed. The Berry plaintiffs claimed that the challenged annexation violated their rights under the equal protection clause of the Fourteenth Amendment because registered voters were not given an opportunity to vote on the annexation. Hunter v. Pittsburgh, supra, was cited by the court for the principle that:

> [A]nnexation by a city or town is purely a state political or legislative matter, entirely within the power of the legislature to regulate.... Thus [Hunter v. Pitts-

> burgh], has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds.

588 F.2d at 424.

Exceptions to the rule that challenges to annexations do not generally lie under the Fourteenth Amendment have been recognized in limited circumstances. A city may not manipulate its boundaries for the purpose of removing voters from the city because of their race; Gomillion v. Lightfoot, 364 U.S. 339, 345, 81 S.Ct. 125, 129, 5 L.Ed.2d 10 (1960). If the state chooses to give residents of an area to be annexed an opportunity to vote on the annexation, that right must be afforded in a manner which comports with the equal protection clause, Hayward v. Clay, 573 F.2d 187 (4th Cir. 1978) (If

the right to vote is given, all registered voters, not just freeholders, must be allowed to vote). However, these limited exceptions are not invoked by the allegations in the actions before the court.

Implicit in those decisions is the principle that fairness requires that those who share in the benefits of a nearby city bear a proportionate share of the costs of providing those benefits.

The allegations in the actions before the court describe a conflict between people who now live just outside Charlotte, but who derive benefit from the City, and City officials who are obliged to seek funding for the benefits the City provides. These cases thus fall squarely within the letter and the

spirit of the law that state legislatures have the responsibility for deciding where and how issues arising out of annexation are to be resolved.

Thus, taking all of the plaintiffs' allegations and showings as true, Hunter v. Pittsburgh, supra, and Berry v. Bourne, supra, make it clear that neither cause of action, in either of these cases, presents a basis upon which relief could be granted.

IT IS THEREFORE ORDERED that:

1. Plaintiffs' motions for partial summary judgment are denied.

2. The defendants' motions for dismissals are allowed.

3. These actions are dismissed.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA WINSTON-SALEM DIVISION

HENRY BREWER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C-82-801-WS
	)	
CITY OF WINSTON-SALEM, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

JUDGMENT

THIS CAUSE came on for hearing on plaintiffs' motion for summary judgment as to their first and second causes of action, and on defendants' motion for summary judgment, before the undersigned at the Federal Courthouse in Greensboro, North Carolina on Friday, October 1, 1982. At the hearing on said motions the plaintiffs were represented by Mr.

Rosbon D. B. Whedbee of Winston-Salem, North Carolina and by Mr. James Hamilton of the Washington, D.C. law firm of Ginsburg, Feldman, Weil and Bress, Chartered; and the defendants were represented by Roddey M. Ligon, Jr. of the Winston-Salem law firm of Womble, Carlyle, Sandridge & Rice, and by City Attorney Ronald G. Seeber. The Court, having considered the pleadings, affidavits, motions, briefs, and oral arguments, adjudges as follows:

1. Plaintiffs' First Cause of Action.

The plaintiffs moved for summary judgment on their first cause of action asserting that the annexations by the City of Winston-Salem challenged by this action are unconstitutional in that they cannot be subjected to proper judicial

review under state law. With respect to this contention, this Court adopts the opinion of Chief Judge Ward entered in the case of Baldwin, et al. v. City of Winston-Salem, et al., C-81-838-WS, filed July 28, 1982, and dealing with the same issue as that raised in this portion of plaintiffs' motion.

The memorandum opinion of Chief Judge Ward states, in part:

> "Both the United States Supreme Court and the Fourth Circuit Court of Appeals have unequivocally resolved the dispositive legal issue presented in this case. In Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), the court stated:
>
> 'Hunter v. Pittsburgh (1907) 207 U.S. 161, 178-179, 28 S.Ct. 40, 52 L.Ed. 151, declared that annexation by a city or town is purely a state political or

legislative matter, entirely within the power of the state legislature to regulate. Its language was sufficiently broad, as an unfriendly commentator has observed, "to dispose of every conceivable challenge to annexation." . . . Thus, it has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds.'

Accord, Carlisle v. City of Charlotte, _____ F. Supp. _____ (W. D.N.C. 1982) (C-C-81-533-M, July 13, 1982).

This Court is bound to follow the decision of the Fourth Circuit and cannot distinguish its firm language from the facts of this case.6/ Plaintiffs fail to state a claim upon which relief can be granted under the fourteenth amendment.

6/ "Exceptions to the rule stated in Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), do not arise in this case."

IT IS, THEREFORE, ORDERED that plaintiffs' Motion for Partial Summary Judgment be, and same hereby is, DENIED."

For the reasons stated therein, the plaintiffs' motion for summary judgment as to its first cause of action must be denied.

2. Plaintiffs' Second Cause of Action.

The plaintiffs next move for summary judgment on their second cause of action. They assert that the annexations by the City challenged in this action are unconstitutional because persons such as plaintiffs Henry Brewer, Robert M. Bircham and Gladys Norman reside or operate businesses in the annexed areas but do not own real property in the annexed areas; and,

therefore, cannot seek judicial review of the annexation under the North Carolina statutes. The defendants respond that the North Carolina law allows any property owner -- not just real property owners -- to challenge North Carolina annexations. During oral argument counsel for the plaintiffs and defendants advised the Court that Henry Brewer, Robert M. Bircham and Gladys Norman are parties plaintiff to a pending action in the Superior Court of Forsyth County, North Carolina, which said action challenges the validity of the annexations involved here. Consequently, this Court is of the opinion that this portion of plaintiffs' motion for summary judgment is moot. This Court does not feel that these plaintiffs may, at this time, contend in this

Court that they do not have a right to contest the annexations in state court when they are in fact at this time contesting the annexations in state court. Thus, the Court feels that the plaintiffs' motion for summary judgment as to their second cause of action must be denied. The Court holds, however, that should the state court judicially determine that the above-named plaintiffs do not have standing to contest the validity of the annexation in state court, plaintiffs would be authorized to reopen this case in order to raise this issue at that time.

3. Defendants' Motion for Summary Judgment.

The defendants move for summary judgment as to all of plaintiffs' claims. For the reasons stated herein,

as well as those stated in the Memorandum Opinion of Chief Judge Ward adopted by this Court, the defendants' motion for summary judgment should be allowed.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that the plaintiffs' motion for summary judgment on the first cause of action is denied; that plaintiffs' motion for summary judgment on the second cause of action is deemed to be moot and thus denied subject to the right of plaintiffs Henry Brewer, Robert M. Bircham and Gladys Norman to reopen this case in the event the state court should hold that said plaintiffs do not have standing in the state court action; and, the defendants' motion for summary judgment is allowed.

- S -
United States District Judge

November 16, 1982

APPENDIX E

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix F

§ 160A-50. Appeal. -- (a) Within 30 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

(b) Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks. Within

five days after the petition is filed with the court, the person seeking review shall serve copies of the petition by registered mail, return receipt requested, upon the municipality.

(c) Within 15 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the municipality shall transmit to the reviewing court

(1) A transcript of the portions of the municipal journal or minute book in which the procedure for annexation has been set forth and

(2) A copy of the report setting forth the plans for extending services to the annexed area as required in G.S. 160A-47.

(d) If two or more petitions for review are submitted to the court, the court may consolidate all such petitions for review at a single hearing, and the municipality shall be required to submit only one set of minutes and one report as required in subsection (c).

(e) At any time before or during the review proceeding, any petitioner or petitioners may apply to the reviewing court for an order staying the operation of the annexation ordinance pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper, and it may permit annexation of any part of the area described in the ordinance concerning which no question for review has been raised.

(f) The court shall fix the date for review of annexation proceedings under this Part, which review date shall preferably be within 30 days following the last day for receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either

(1) That the statutory procedure was not followed, or

(2) That the provisions of G.S. 160A-47 were not met, or

(3) That the provisions of G.S. 160A-48 have not been met.

(g) The court may affirm the action of the governing board without change, or it may

(1) Remand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.

(2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. 160A-48 if it finds that the provisions of G.S. 160A-48 have not been

met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.

(3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of G.S. 160A-47 are satisfied.

If any municipality shall fail to take action in accordance with the court's instructions upon remand within three

months from receipt of such instructions, the annexation proceeding shall be deemed null and void.

(h) Any party to the review proceedings, including the municipality, may appeal to the Supreme Court from the final judgment of the superior court under rules of procedure applicable in other civil cases. The appealing party may apply to the superior court for a stay in its final determination, or a stay of the annexation ordinance, whichever shall be appropriate, pending the outcome of the appeal to the Supreme Court; provided, that the superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made and which can be incorporated

into the city without regard to any part of the area concerning which an appeal is being made.

(i) If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior or Supreme Court on the effective date of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the date of the final judgment of the superior or Supreme Court, whichever is appropriate, or the date the municipal governing board completes action to make the ordinance conform to the court's instructions in the event of remand. (1959, c. 1009, s. 6; 1973, c. 426, s. 74.)